Ndii & 4 others v Attorney General & 3 others; Kenya Human Rights Commission & 2 others (Intended Amicus Curiae) (Petition E282 of 2020) [2020] KEHC 738 (KLR) (Constitutional and Human Rights) (30 November 2020) (Ruling)

David Ndii &4 others v Attorney General & 3 others; Kenya Human Rights Commission & 2 others (Intended AmicusCuriae) [2020] eKLR

Neutral citation: [2020] KEHC 738 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E282 OF 2020

AC MRIMA, J

NOVEMBER 30, 2020

BETWEEN

DAVID NDII .... 1ST PETITIONER

JEROTICH SEII .... 2ND PETITIONER

JAMES GONDI .... 3RD PETITIONER

WANJIRU GIKONYO .... 4TH PETITIONER

IKAL ANGELEI .... 5TH PETITIONER

AND

ATTORNEY GENERAL .... 1ST RESPONDENT

SPEAKER OF THE NATIONAL ASSEMBLY .... 2ND RESPONDENT

SPEAKER OF THE SENATE .... 3RD RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 4TH RESPONDENT

AND

KENYA HUMAN RIGHTS COMMISSION .... INTENDED AMICUS CURIAE

KITUO CHA SHERIA .... INTENDED AMICUS CURIAE

DR DUNCAN OBURU OJWANG .... INTENDED AMICUS CURIAE

Petition raising questions on constitutional provisions unamendable by law, referred to the Chief Justice for bench of uneven judges of not less than three

The case highlights that the High Court has the power under Article 165(3) of the Constitution to hear petitions that protect the "basic structure" of the Constitution from amendments. Further, Preliminary objections based on issues needing evidence or speculation cannot be accepted. The court also confirmed that cases involving important constitutional questions, especially those affecting the Constitution's core principles, can be referred to an expanded bench. This decision highlights the court's role in safeguarding the Constitution and ensuring thorough consideration of challenges to its key provisions.

Reported by Beryl Ikamari

Jurisdiction *- jurisdiction of the High Court - jurisdiction to determine questions related to constitutionality - whether the High Court could determine a petition which sought declarations that certain provisions of the Constitution were incapable of being amended -Constitution of Kenya 2010, article 165(3).*

Civil Practice and Procedure *- preliminary objection - nature of a preliminary objection - whether a preliminary objection could contain points of law that require a consideration of evidence.*

Constitutional Law *- judiciary - judges - empanelment of a bench of an uneven number of judges being not less than three - circumstances under which the High Court would certify that a matter raised substantial questions of law warranting the empanelment of a bench of judges - Constitution of Kenya 2010, article 165(4).*

Words and Phrases *- jurisdiction - definition of - the court's power to entertain, hear and determine a dispute before it- Black's Law Dictionary, 9th Edition.*

Brief facts

The petition sought various declarations meant to assert applicability of various judicial doctrines to Kenya's Constitution. The doctrines included the doctrine of the basic structure of a Constitution, the doctrine and theory of unamendability of eternity clauses, the doctrine and theory of constitutional entrenchment clauses and unamendable constitutional provisions. The petitioner sought declarations whose import was that certain provisions of the Constitution could not be amended either under article 256 of the Constitution by Parliament or through popular initiative under article 257 of the Constitution.

The provisions which the petitioner said were in the form of the basic structure, entrenchment clauses or eternity provisions of the Constitution of Kenya 2010 were Chapter One on sovereignty of the people and supremacy of the Constitution, Chapter Two on the Republic, Chapter Four on the Bill of Rights, Chapter Nine on the Executive and Chapter Ten on the Judiciary .

The petitioner filed an application seeking an order that the petition raised substantial questions of law under article 165(3)(b) and 165(3)(d) of the Constitution and for the referral of the petition to the Chief Justice for assignment of an uneven number of Judges, being not less than three to hear it.

The 1st respondent filed a preliminary objection. Generally, the 1st respondent stated that the petition was non-justiciable as there were no justiciable issues and it were not ripe. The 1st respondent's preliminary objection was also premised on the ground that the petition sought an advisory opinion which court lacked jurisdiction to issue. The 2nd respondent also raised a preliminary objection which was *inter alia* based on the issue of justiciability and ripeness, the petition being speculative and anticipatory and it being scandalous and vexatious.

The 3rd respondent's preliminary objection was premised on grounds that the petition was theoretical, that it sought to challenge the validity and legality of the Constitution, which was contrary to article 2(3) of the Constitution, it was frivolous, incompetent and vexatious, it did not disclose any infringement or violation of the petitioners' rights and that the court lacked jurisdiction to hear and determine the petition.

Three applications were also made for the joinder of three *amici curiae*.

Issues

1. Whether the High Court had jurisdiction to hear and determine a petition, that sought declarations to the effect that certain provisions of the Constitution were subject to doctrines of the basic structure of the Constitution, eternity clauses, constitutional entrenchment clauses and unamendable constitutional provisions, and they could not be amended.
2. Whether a preliminary objection could be based on a point of law which required consideration of evidence.
3. When would the High Court issue certification that a matter raised substantial questions of law warranting the empanelment of an expanded bench?

Held

1. A preliminary objection was a point of law which had been pleaded or which arose by clear implication out of the pleadings and, which if argued as a preliminary point, would dispose of the suit. The objections raised fell short of standing as preliminary objections. The issues raised were highly contested and largely dependent on evidence. For example, there was no concurrence that the parliamentary Bills annexed in support of the petition amounted to a threatened violation of the Constitution.
2. A court's jurisdiction was derived from the Constitution, statute or a settled judicial precedent. Jurisdiction was a central issue in court proceedings. A court that acted without jurisdiction acted in vain. Issues about jurisdiction were capable of being raised at any stage in proceedings.
3. There was no doubt that the supremacy of the Constitution was not subject to challenge. The petition aimed to defend and protect the Constitution and not to challenge the supremacy of the Constitution or sovereignty of the people. What the petitioners sought was for the court to clearly pronounce itself on the parameters which would prevent the destruction of what the petitioners referred to as the basic structure of the Constitution, during the process of constitutional amendment.
4. The court had jurisdiction to hear and determine the petition under article 165(3) of the Constitution.
5. The petitioner had an obligation to demonstrate with some degree of precision the right, fundamental freedom or part of the Constitution that it alleged had been violated or was threatened with violation, the manner or evidence of the violation or threatened violation and the relief it sought for that violation or threatened violation. Proof was based on evidence.
6. An allegation of a threat or violation of rights, fundamental freedoms or the Constitution was a matter of fact. Such a factual allegation could only be dealt with by presentation of evidence. Preliminary objections could not be used to contend that the Bills annexed to the petition did not amount to evidence of a threatened violation of the Constitution. A preliminary objection had to be based on settled facts and it could not be used to challenge the quality of evidence in support of a petition.
7. The question as to whether the petition was non-justiciable on account of the doctrine of ripeness could be canvassed at an appropriate manner and at an appropriate time. Out of abundance of caution, the question as to whether what the petition sought was an advisory opinion could also be canvassed an appropriate time and manner.
8. The principles governing certification by the High Court that a matter raised a substantial question of law so as to warrant the empanelment of an expanded bench were settled in judicial precedent. The petition met the set criteria. It was of immense public interest; the issues raised were not only weighty but also complex and unsettled. The issues fell within the terms of articles 165(3)(b) or 165(3)(d) of the Constitution and the petitioner crafted clear issues of law to be dealt with.

Orders

1. *The High Court was seized of the jurisdiction to deal with the petition dated September 16, 2020.*
2. *The preliminary objection dated September 29, 2020, the preliminary objection dated October 2, 2020 and the undated preliminary objection were struck out with no order as to costs.*

3. *It was certified that the petition dated September 16, 2020 raised substantial questions of law as to warrant an expanded bench of the High Court.*
4. *The matter was referred to the Honourable the Chief Justice of the Republic of Kenya to assign an uneven number of judges, in terms of article 165(4) of the Constitution to hear and determine it.*
5. *The applications for joinder were to be dealt with by the expanded bench.*

Citations

Cases

Kenya

1. *Alila, Titus & 2 others (Suing on their own Behalf and as the Registered Officials of the Sumawe Youth Group) v Attorney General & another* Constitutional Petition 22 of 2018; [2019] KEHC 3778 (KLR) - (Mentioned)
2. *Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties)* Petition 206 of 2019; [2020] KEHC 7924 (KLR) - (Mentioned)
3. *Centre for Rights Education & Awareness (CREAW) v Attorney General & another* Petition 182 of 2015; [2015] KEHC 7433 (KLR) - (Explained)
4. *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another* Petition 628 & 630 of 2014; [2015] KEHC 6984 (KLR) - (Mentioned)
5. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR) - (Explained)
6. *In the Matter of Interim Independent Electoral Commission* Constitutional Application 2 of 2011; [2011] KESC 3 (KLR);[2011] 2 KLR 223 - (Explained)
7. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] KESC 5 (KLR) - (Explained)
8. *Jamal, Salim v Yusuf Abdulahi Abdi & another* Civil Appeal 103 of 2016; [2018] KECA 14 (KLR) - (Explained)
9. *Kakuta, Maimai Hamisi v Peris Pesi Tobiko & 2 others* Civil Appeal 154 of 2013; [2013] KECA 279 (KLR) - (Explained)
10. *Kamau, Jesse & 25 others v Attorney General* Miscellaneous Civil Application 890 of 2004; [2010] KEHC 3166 (KLR) - (Mentioned)
11. *Kaminja, Daniel & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi* Judicial Review 441 of 2018; [2019] KEHC 2059 (KLR) - (Mentioned)
12. *Kimani, Joseph & 2 others v Attorney General & 2 others* Constitutional Petition 669 of 2009; [2010] KEHC 2891 (KLR) - (Explained)
13. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Applied)
14. *Mbete Mwilu, Philomena v Director of Public Prosecution, & 4 others* Petition 295 of 2018; [2018] KEHC 3432 (KLR) - (Explained)
15. *Muigai, Samuel Ng'ang'a v Minister For Justice, National Cohesion & Constitutional Affairs & another* Petition 354 of 2012; [2013] KEHC 6091 (KLR) - (Mentioned)
16. *Musakali, John v Speaker County of Bungoma & 4 others* Petition 11 of 2015; [2015] KEHC 2131 (KLR) - (Applied)
17. *Mutua, Alfred v Ethics & Anti-Corruption Commission (EACC) & 4 others* Civil Application 31 of 2016; [2016] KECA 596 (KLR) - (Explained)
18. *Mwau, John Harun & 3 others v Attorney General & 2 others* Constitutional Petition 65, 123 & 185 of 2011; [2012] KEHC 5438 (KLR);[2012] 1 KLR 73 - (Mentioned)
19. *National Conservative Forum v Attorney General* Petition 438 of 2013; [2013] KEHC 6018 (KLR) - (Mentioned)

20. *Njoya, Timothy & 6 others v Attorney General & 4 others* Miscellaneous Civil Application No 82 of 2004; [2004] KEHC 1467 (KLR); [2004] 1 KLR 232 - (Explained)
21. *Okiya, Omtatah Okoiti v Communication Authority of Kenya & 8 others* Constitutional Petition 53 of 2017; [2018] KEHC 7513 (KLR) - (Explained)
22. *Omtatah, Okoiti Okiyah & another v Anne Waiguru - Cabinate Secretary, Devolution and Planning & 3 others* Civil Appeal 4 of 2015; [2017] KECA 679 (KLR) - (Applied)
23. *Onyango , Patrick Ouma & 12 others v Attorney General* Application 677 of 2005 - (Mentioned)
24. *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others* Civil Appeal 37 of 2018; [2018] KECA 292 (KLR) - (Explained)
25. *Oraro v Mbaja* Civil Suit 85 of 1992; [2005] KEHC 3182 (KLR);[2005] 1 KLR 141 - (Explained)
26. *Owners of the Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); [1989] KLR 1 - (Applied)
27. *Republic v National Employment Authority & 30 others ex-parte middle Ex-consultancy services Limited* Judicial Review Application 171 of 2018; [2018] KEHC 9449 (KLR) - (Mentioned)
28. *Republic v Public Service Commission & Keriako Tobiko Ex parte Nelson Havi* Miscellaneous Application 629 of 2015; [2017] KEHC 3581 (KLR) - (Applied)
29. *Steyn v Ruscone* Application 4 of 2012; [2013] KESC 11 (KLR) - (Applied)
30. *Wanjiru, Gikonyo & 2 others v National Assembly of Kenya & 4 others* Petition 178 of 2016; [2016] KEHC 4450 (KLR) - (Mentioned)

South Africa

S v Acheson, 1991 (2) SA 805 - (Followed)

Regional Court

Mukisa Biscuits Manufacturing Company Limited v West End Distributors [1969] EA 696 - (Applied)

Texts

1. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn
2. Hogg, QM., (Lord Hailsham) *et al* (Eds) (1982), *Halsbury's Laws of England* London: Butterworths 4th Edn Vol 9
3. Saunders, JB., Burrows, R., (Eds) (1989), *Words and Phrases Legally Defined* London: Butterworths Vol 3

Statutes

Kenya

Constitution of Kenya articles 1 (1), (2), (3); 2 (3); 25; 191; 255;256; 257; 258(1);163(4)(b)(6);165(3)(4); Chapter 1, 2, 4, 9, 10–(Interpreted)

Advocates

Mr. Havi for the petitioners.

Mr. Bitta, Deputy Chief State Counsel, for the 1st respondent.

Mr. Kuiyoni for the 2nd respondent.

Mr. Wambulwa for the 3rd respondent.

Mr. Owiye for the 4th respondent.

Dr. Khaminwa & *Miss Valentine Khaminwa*, for the 1st & 2nd intended *amici curiae*.

Miss. Nyuguto for the 3rd intended *amicus curiae*

RULING

Ruling No 1

> “The *Constitution* of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a ‘mirror reflecting the national soul’; the identification of ideals and .... aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the *Constitution* must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion.”

Extract from the Namibian case, *S v Acheson*, 1991 (2) SA 805 (Mahomed, AJ) at p 813.

1. A Constitution is the supreme law of the land. It is a solemn document. It carries along the values and aspirations of the people. It forms part of, and, permeates every sector of the society.

2. The issues raised in the petition before this court rest at the heart of the *Constitution of Kenya, 2010*. In the main, the petition dated September 16, 2020, seeks the following orders: -

    1. A declaration be and is hereby issued that the legal and judicial doctrines of the “basic structure” of a constitution; the doctrine and theory of unamendability of “eternity clauses” the doctrine and theory of “constitutional entrenchment clauses” and “unamendable constitutional provisions” in a constitution are applicable in the Republic of Kenya.

    2. A declaration be and is hereby issued that chapter one on sovereignty of the people and supremacy of the *Constitution*, Chapter two on The Republic, Chapter four on the Bill of Rights, Chapter nine on the Executive and Chapter ten on the Judiciary and the provisions therein forms part of the “Basic structure”; “Entrenchment Clauses” and “eternity” provisions of the Kenyan *Constitution* 2010 and therefore cannot be amended either under article 256 by parliament or through popular initiative under article 257 of the *Constitution*.

    3. A declaration be and is hereby issued that taking guidance from the doctrine of the “basic structure” of the *Constitution*, “the constituent power” and the doctrines of “unconstitutional constitutional amendments”, “the limits of the amendment power in the *Constitution*” and the theory of unamendability of “eternity” clauses, there is an implicit or implied limitation to constitutional amendments in Kenya?

    4. A declaration be and is hereby issued that the amendment powers under articles 25 and 257 are implicitly limited to the extent that parliament cannot pass an amendment which destroys the basic structure of the Kenyan constitutional foundation, to wit; Chapter one on Sovereignty of the People and Supremacy of the *Constitution*, Chapter two on The Republic, Chapter four on the Bill of Rights, Chapter nine on the Executive and Chapter ten on the Judiciary and the provisions therein.

    5. A declaration be and is hereby issued that Kenyan Parliament cannot pass any laws that alters the basic structure of the Kenyan constitutional foundation, to wit; Chapter one on Sovereignty of the People and Supremacy of the *Constitution*, Chapter two on The Republic, Chapter four on the Bill of Rights, Chapter nine on the Executive and Chapter ten on the Judiciary and the provisions therein.

    6. Each party should bear its own costs.

7. Any other order that this honourable court may deem just and fit in the circumstances.

3. Contemporaneously with the petition, the petitioners filed a notice of motion dated September 16, 2020 (hereinafter referred to as 'the application'). The application sought the following: -

   1. An order be and is hereby made that the petition herein dated September 16, 2020 raises substantial questions of law under clauses (3)(b) and (d) of article 165 of the *Constitution of Kenya*.

   2. The petition herein dated September 16, 2020 be and is hereby referred to the Chief Justice for assignment of an uneven number of Judges, being not less than three to hear it.

   3. The costs of this application be provided for.

4. The petition and the application are strenuously opposed by the respondents. The 1st, 2nd and 3rd respondents filed preliminary objections. The 4th respondent filed submissions on the main petition. The preliminary objection by the 1st respondent is dated September 29, 2020 and is tailored as follows: -

   1. The petition as framed offends the principle of justiciability on account of want of ripeness.

   2. The petitioners are essentially seeking an advisory opinion of the honourable court, which opinion the honourable court lacks the jurisdiction to issue.

   3. The petition as framed does not disclose a justiciable dispute between the parties.

   4. That to the extent that the petition challenges the sovereignty of the people of Kenya more particularly the legality of articles 1 (1), (2), and (3) of the *Constitution* the petition is non-justiciable.

5. The preliminary objection by the 2nd respondent is dated October 2, 2020 and is as follows: -

   a. The petitioners' notice of motion and petition are not justiciable for violating the doctrine of ripeness which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contingencies.

   b. The petitioners' notice of motion and petition is speculative and deals with prospective anticipatory circumstances rather than current or probable events.

   c. The petitioners' notice of motion and petition offend the decision in *Re: Harmonised Draft Constitution of Kenya: Bishop Kimani and 2 others v Attorney General* Mombasa HCCP No 669 of 2009 (Unreported); which bars the honourable court from declaring any part of the *Constitution* unconstitutional. Mohammed Ibrahim, J (as he then was) observed that;

      > "Courts must be wary to undermine the presumption of constitutionality of legislation and it must reject any invitation to question or interpret the constitutionality of the *Constitution* itself."

   d. The petition and the notice of motion is frivolous, incompetent, vexatious, misconceived and an outright abuse of the court process to the extent that it seeks an advisory opinion, a role that is vested in the Supreme Court of Kenya by the *Constitution* under article 163(6).

6. The 3rd respondent's preliminary objection is undated and posits that: -

   1. The petition seeks an opinion of the honorable court on theoretical questions, of which this honorable court lacks jurisdiction to determine.

2. The jurisdiction of the High Court under article 165(3)(d) is limited to the following questions:

   (i) the question whether any law is inconsistent with or in contravention of this Constitution;

   (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

   (iii) any matter relating to constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

   (iv) a question relating to conflict of laws under article 191;

3. The petition seeks to challenge the validity and legality of the *Constitution* more particularly the preamble and articles, 1(1), (2) and (3), 255, 256 and 257 of the *Constitution*, contrary to the provisions of article 2(3) of the *Constitution*.

4. The petition as framed does not disclose any triable legal issues to be addressed by this honorable court hence is frivolous, incompetent, vexatious, misconceived and an outright abuse of the court process.

5. The petition does not disclose any right that is being infringed or threatened with infringement as to affect the Petitioners.

6. The petition challenges legislative proposals that parliament considered but were not enacted into law and the mere introduction of Bills in Parliament does not constitute a violation of the *Constitution* and as such the Petition herein is an academic exercise.

7. The petition offends the principle of justiciability and hence premature and moot.

8. The petition and orders sought are defective and the court has no jurisdiction to grant the orders as framed as this would amount to prior judicial restraint.

9. Based on the foregoing, this honourable court lacks jurisdiction to entertain the petition as drafted and ought to strike out the petition and the application with costs to the 3rd respondent.

7. Further to the foregoing, there were three other applications for joinder. The first application is the notice of motion dated October 1, 2020 by Kenya Human Rights Commission to be enjoined as the 1st amicus curiae. There was an oral application for joinder by Kituo Cha Sheria as the proposed 2nd amicus curiae. The third application for joinder was by one Dr Duncan Oburu Ojwang, as the 3rd *amicus curiae*. It is undated.

8. The parties proposed, and with the concurrence of the court, the application, the three preliminary objections and the joinder applications were heard together, by way of reliance on written submissions. The court issued timelines within which the parties were to comply.

9. Counsels for the parties briefly highlighted on their respective submissions.

10. From my reading of the court documents filed and consideration of the submissions of the parties, I have identified the following five issues for determination: -

i. Whether this court has jurisdiction to deal with the petition and the application as they seek to challenge the validity and legality of the *Constitution*;

ii. Whether the petition and the application are injusticiable for want of ripeness;

iii. Whether the petition and the application seek an advisory opinion from the High Court;

iv. Whether a certification should issue for empanelment of an expanded bench.

v. The joinder applications;

11. I will now address each of the identified issues in seriatim.

Whether the court has jurisdiction to deal with the petition and the application as they seek to challenge the validity and legality of the *Constitution*:

12. The 1st, 2nd and 3rd respondents took a common position on this issue. They contend that the jurisdiction of this court is expressly ousted since the petition seeks to challenge to legality of the sovereignty of the *Constitution*. It is argued that articles 1 and 2(3) of the *Constitution* provides that the validity or legality of the *Constitution*, which includes provisions in the *Constitution*, is not subject to challenge by or before any court or other state organ. Differently put, it is submitted that on the basis of the above provisions, this honourable court has no jurisdiction to question the constitutionality, legality, validity or propriety or otherwise of any constitutional provision or the *Constitution* in its entirety. Equally, the court sitting in its interpretational functions cannot in law question the *Constitution* or purport to interpret or construe on any inconsistencies inter se or between various provisions of the *Constitution*.

13. It is further argued that this court is, therefore, barred from declaring any part of the *Constitution* unconstitutional. The decision by Ibrahim, J (as he then was) in *Joseph Kimani & 2 others v Attorney General & 2 others* [2010] eKLR was referred to.

14. The respondents further submitted that in any case, chapter 16 of the *Constitution* and more particularly articles 255, 256 and 257 sets in very precise, clear and concise manner how the *Constitution* can be amended.

16. This court was urged to strike out the petition with costs even on this issue alone.

16. The petitioners are of the converse position. They submit that the preliminary objections are not appropriate responses to the petition since all the cases referred to by the 1st to the 3rd respondents on this question arise out of a merit determination of the issues framed in those petitions. None of the cases were determined summarily on a preliminary objection.

17. On jurisdiction, the petitioners posited that the High Court has original jurisdiction by dint of article 165(3)(d) of the *Constitution* to hear and determine any question on the interpretation of the *Constitution* including a determination on the following four issues:

(i) the question whether any law is inconsistent with or in contravention of the *Constitution*;

(ii) the question whether anything said to be done under the authority of the *Constitution* or of any law is inconsistent with or in contravention of the *Constitution*;

(iii) any matter relating to the constitutional powers of State organs, in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under article 191 of the *Constitution*.

18. It is submitted that article 258(1) of the *Constitution* entitles every person to institute court proceedings to challenge a contravention of the *Constitution* or any threatened contravention of the same. The petitioners further submitted that the High Court is clothed with unlimited jurisdiction to determine any matter relating to the *Constitution*. The petitioners contends that, they are, therefore, properly before this court.

19. Since the issues under consideration were largely raised by way of preliminary objections, a look at the law on preliminary objections is of utmost importance. Law, JA in *Mukisa Biscuits Manufacturing Company Limited v West End Distributors* [1969] EA 696 had the following to say: -

> So far as i am aware, a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.........

20. Differently put, the High Court in *John Musakali v Speaker County of Bungoma & 4 others* [2015] eKLR held that: -

> The position in law is that a preliminary objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the preliminary objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable preliminary objection on a point of law.

21. Before I leave this discourse, my attention has been drawn to the words of Ojwang, J (as he then was) in *Oraro v Mbaja* (2005) KLR 141 where after quoting the statement of Law, JA in the *Mukisa Biscuits* case (*supra*) went on to state that: -

> A 'preliminary objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....
>
> Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence......

22. By juxtaposing the issues raised in the objections and the contents of the petition with the law on preliminary objections, I find that the objections fall short of standing as such. I say so because the issues before court are highly contested and largely depend on evidence. In other words, the objections 'derive their foundations from unsettled factual information which must be tested in accordance with the normal rules of evidence.' For instance, there is no concurrence that the Parliamentary Bills annexed in support of the petition amount to threats to violation of the *Constitution*.

23. I would have ended this discussion here, however, I will nevertheless, deal with the rest of the issues.

24. Jurisdiction is defined in *Halsbury's Laws of England* (4th Ed) Vol 9 as "...the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". *Black's Law Dictionary*, 9th Edition, defines jurisdiction as the court's power to entertain, hear and determine a dispute before it.

25. In *Words and Phrases Legally Defined* Vol 3, John Beecroft Saunders defines jurisdiction as follows:

> By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

26. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -

> Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...

27. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in *Jamal Salim v Yusuf Abdulahi Abdi & another* Civil Appeal No 103 of 2016 [2018] eKLR stated as follows: -

> Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this court in *Adero & another v Ulinzi Sacco Society Limited* [2002] 1 KLR 577, as follows;
>
> 1) ....
>
> 2) The jurisdiction either exists or does not ab initio ...
>
> 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
>
> 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

28. On the centrality of jurisdiction, the Court of Appeal in *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR stated that: -

> So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for

economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.

29. On the source of a court's jurisdiction, the Supreme Court of Kenya in Constitutional Application No 2 of 2011 *In the Matter of Interim Independent Electoral Commission* [2011] eKLR held that: -

> 29. Assumption of jurisdiction by courts in Kenya is a subject regulated by the *Constitution*, by statute law, and by principles laid down in judicial precedent ....

30. Later, in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others* [2012] eKLR Supreme Court stated as follows: -

> A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings ... where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

31. And, in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others* [2018] eKLR, the Court of Appeal further stated: -

> (44) .... a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...

32. From the foregoing, it is sufficiently settled that a court's jurisdiction is derived from the *Constitution*, an Act of Parliament or a settled judicial precedent.

33. There is no doubt that the supremacy of the *Constitution* is not subject to any challenge. Article 2(3) states clearly that: -

> The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.

34. I have carefully perused the 479 paragraphs of the petition. The title to the Petition reads as follows: -

> In the matter of threatened contravention and violation of Chapters One, Two, Four, Nine, Ten and in particular articles 256 and 257 of the *Constitution of Kenya* on the the application of the legal doctrine and theory of the "basic structure" of a constitution: the doctrine of "constitutional entrenchment clauses" "unamendable constitutional provisions", the doctrine and theory of "unconstitutional constitutional amendments", the theory of

unamendability of "eternity clauses" "essential features" "supra- constitutional laws" in a constitution, and the "implied limitations" to constitutional amendments in Kenya.

35. My understanding of the petition before court is that the petition seeks to, instead, protect and defend the *Constitution*. The petition is not aimed at challenging the supremacy of the *Constitution* or the sovereignty of the people. The petitioners have only raised a red-flag that Chapters One, Two, Four, Nine, Ten and in particular articles 256 and 257 of the *Constitution* are threatened with violation. The Petitioners are raising serious issues going to the root of the *Constitution*. They are indeed crying loudly that 'look...... the basic structure of the *Constitution* is undermined!'

36. The petition is an attempt to bring out and assert the applicability or otherwise of various emerging doctrines and jurisprudence in constitutional interpretation in Kenya. Infact, the petitioners have no problem with Parliament amending the *Constitution*. They are alive to the provisions of articles 255, 256 and 257 which sets out the manner in which the *Constitution* may be amended. The petitioners are at peace with the way the *Constitution* currently is. Their concern is what is sought to be introduced into the *Constitution* through the intended amendments.

37. What the petitioners seek to achieve through this petition is for this court to put clear parameters within which Parliament, while discharging its constitutional duty in amending the *Constitution*, does not destroy what the petitioners refer to as 'the basis structure of' the *Constitution*. That is not the same as challenging the sovereignty of the People of Kenya and/or the supremacy of the *Constitution*.

38. The respondents seem to have missed the gist of the petition. They contend that the petition is out to challenge the sovereignty of the People of Kenya and the supremacy of the *Constitution*. I do not think so. To me, the Petitioners are infact discharging their constitutional obligations under articles 3 and 258(1) in defence of the *Constitution*.

39. Having said so, I do not have any doubt in my mind that this court is seized of the requisite jurisdiction under article 165(3) of the *Constitution* to deal with this matter. The issue is hence answered in the negative.

Whether the Petition and the application are injusticiable for want of ripeness:

40. It is the 1st, 2nd and 3rd respondents' position that the petition, as presented, does not disclose any dispute for adjudication and that it is caught up by the doctrine of ripeness hence it ought to be dismissed.

41. The 1st respondent contend that the petition is procedurally not justiciable on account of the matters therein not being ripe for determination. The respondent submit that the petition as framed is premised on hypothetical scenarios and is devoid of a factual matrix that would support the invocation of the Honourable court's jurisdiction. The petition, it is submitted, centers on imaginary amendments to the *Constitution*. There is no evidence that the processes articles 256 or 257 of the *Constitution* have been invoked.

42. The decisions in *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR, *Jesse Kamau & 25 others v Attorney General* Misc. Application 890 of 2004, *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & another* HCCP 628 of 2014 [2015] eKLR, *Patrick Ouma Onyango & 12 others v AG & 2 others* Misc Appl No 677 of 2005, *Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi* [2019] eKLR and *Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 others* [2018] eKLR were variously referred to in support of the submission.

43. The 2nd respondent posits that the petitioners have not demonstrated that Parliament is in the process of passing laws that alter the basic structure of the *Constitution*. Instead, the petitioners seem to

challenge legislative proposals that Parliament considered but were not enacted into law. Accordingly, the factual claims underlying the litigation are hypothetical and academic. Consequently, there is no dispute for this court to resolve.

44. It is further posited that the process of litigation is not an academic exercise but a process through which actual disputes are settled. The second respondent submits that there is no controversy requiring adjudication by this honourable court and that if the court hears the petition it would only be offering legal advice. The 2nd respondent also submits that the requirement of a real and actual dispute between parties is a limitation to the jurisdiction of the court.

45. The 2nd respondent relies in *Samuel Muigai Ng'ang'a v Minister For Justice, National Cohesion & Constitutional Affairs & another* [2013] eKLR, *National Conservative Forum v Attorney General* [2013] eKLR, *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR, *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & Another* HCCP 628 of 2014 [2015]eKLR, *Republic v National Employment Authority & 30 others Ex-parte middle Ex-consultancy services Limited* (2018) eKLR, *Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties)* [2020] eKLR and *John Harun Mwau & 3 others v Attorney General & 2 others* [2012] eKLR in urging the court to decline jurisdiction.

46. The 3rd respondent, as well, joined the other respondents in submitting that the petition has not disclosed any triable legal issues; it does not disclose any right that is being infringed or threatened with infringement as to affect the petitioners and largely challenges the legislative proposals that Parliament considered but were not enacted into law.

47. According to the 3rd respondent the mere introduction of Bills in Parliament does not constitute a violation or a threat of violation to the *Constitution*. The 3rd respondent argues that the factual claims underlying the litigation are hypothetical and academic. Consequently, there is no dispute for this court to resolve. It further argues that there is no controversy requiring adjudication by this honourable court and that if the court hears the petition it would only be offering legal advice.

48. The 3rd respondent further argues that the petition does not meet the threshold for a constitutional petition that requires interpretation by this honourable court. It is also argued that this court can only be called upon where there is a violation or a threatened violation of the *Constitution*, which in this case, does not exist and as such the matter is not justiciable as there is no real controversy that the court is called to determine.

49. The court is called upon to find that the petition is frivolous, incompetent, vexatious, misconceived and an outright abuse of the court process. The 3rd respondent prays for the dismissal of the petition with costs.

50. The 3rd respondent relies on *Samuel Muigai Ng'ang'a v Minister for Justice, National Cohesion & Constitutional Affairs & another* [2013] eKLR, *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR, *Republic v National Employment Authority & 30 others Ex-parte middle Ex-consultancy services Limited* (2018) eKLR, *Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties)* [2020] eKLR, *Titus Alila & 2 others (Suing on their own Behalf and as the Registered Officials of the Sumawe Youth Group) v Attorney General & another* [2019] eKLR, *John Harun Mwau & 3 others v Attorney General & 2 others* [2012] eKLR and *Reverend Dr Timothy M Njoya and 6 others v Attorney General and another* [2004] eKLR in support of its submissions.

51. In response, the petitioners hold the position that the petition is properly justiciable before court and is not caught up by the doctrine of ripeness. They submit that the petition raises germane questions

in controversy in so far as the legislative and amendment powers of Parliament are concerned. They argue that, it is imperative to note the over twenty-one Bills tabled before Parliament, and which are impugned, tend to alter the basic structure of the *Constitution*. The claim that the Bills have not been enacted into law and that the challenge to the same is academic is unsustainable. Referring to articles 165 and 258 of the *Constitution*, the petitioners argued that one is entitled to challenge a threatened contravention of the *Constitution* and as such, the petition is not an academic exercise.

52. To be able to deal with this issue, I will address two sub-issues. They are, first, the manner in which constitutional petitions ought to be framed and proved, and, second, what the term 'threat to violation of the *Constitution*' entails.

53. The issue of the burden of proof on a petitioner in a constitutional petition was addressed by the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR:

> Although article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

54. The Court of Appeal in Civil Application Nai 31 of 2016 *Alfred N Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 others* [2016] eKLR stated as follows: -

> 34. .... We find that the applicant is entitled in law to institute proceedings whenever there is threat of violation of his fundamental rights and freedoms or threat of violation of the *Constitution*. Whether there is a threat of violation is a question of fact and evidence must be adduced to support the alleged threat.

55. From the foregoing, it can be safely summed up that the law places an obligation upon a petitioner to demonstrate with some degree of precision the right, fundamental freedom or the part of the *Constitution* it alleges has been violated or is threatened with violation, the manner or evidence of violation or threatened violation and the relief it seeks for that violation or threat to violation. The proof is hence based on evidence. That settles the first sub-issue.

56. I will now deal with the second sub-issue: What the term threat to violation of the *Constitution* entails. The superior courts have dealt with this aspect.

57. The High Court in Petition Nos 628, 630 of 2014 & 12 of 2015 (Consolidated), *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10 others* [2015] eKLR discussed the issue as follows: -

> 112. However, we are satisfied, after due consideration of the provisions of article 22, 165(3)(d) and 258 of the *Constitution*, that the words of the *Constitution*, taken in their ordinary meaning, are clear and render the present controversy ripe and justiciable: a party does not have to wait until a right or fundamental

freedom has been violated, or for a violation of the *Constitution* to occur, before approaching the court. He has a right to do so if there is a threat of violation or contravention of the *Constitution*.

113. We take this view because it cannot have been in vain that the drafters of the *Constitution* added "threat" to a right or fundamental freedom and "threatened .... contravention" as one of the conditions entitling a person to approach the High Court for relief under article 165(3)(b) and (d)(i). A "threat" has been defined in Black's Dictionary, 9th Edition as; "an indication of an approaching menace eg threat of bankruptcy; a Person or a thing that might cause harm" (emphasis added). The same dictionary defines "threat" as "a communicated intent to inflict harm or loss to another..."

114. The use of the words "indication", "approaching", "might" and "communicated intent" all go to show, in the context of articles 22, 165(3)(d) and 258, that for relief to be granted, there must not be actual violation of either a fundamental right or of the *Constitution* but that indications of such violations are apparent.

115. What is the test to apply when a court is confronted with alleged threats of violations aforesaid? In our view, each case must be looked at in its unique circumstances, and a court ought to differentiate between academic, theoretical claims and paranoid fears with real threat of constitutional violations. In that regard, Lenaola J in Commission for the Implementation of the *Constitution v National Assembly & 2 others* [2013] eKLR differentiated between hypothetical issues framed for determination in that case and the power of the High Court to intervene before an Act of Parliament has actually been enacted and in circumstances such as are before us where the impugned Act has been enacted and has come into force. He stated in that regard that:

...... where the basic structure or design and architecture of our Constitution are under threat, this court can genuinely intervene and protect the *Constitution*.

116. We agree with the Learned Judge and would only add that clear and unambiguous threats such as to the design and architecture of the *Constitution* are what a party seeking relief must prove before the High Court can intervene.

58. The High Court in Petition No 182 of 2015 *Centre for Rights Education & Awareness (CREAW) v Attorney General & another* [2015] eKLR quoted with approval the findings in *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* (supra) regarding threatened violation of the *Constitution*. The dispute regarded the failure by Parliament to implement the Supreme Court Advisory Opinion No 2 of 2012 *In the matter of Gender Representation in the National Assembly and the Senate*. The Petitioners argued that the failure by the Parliament to implement the Bill giving effect to gender parity was a threat to the *Constitution*. The Respondents opposed it arguing that the case was premature and speculative and that it did not disclose any violation of the Bill of Rights. While disagreeing with the respondents' assertions, the court stated as hereunder: -

65. The petitioner is in this case apprehensive that there is a threat of violation of the *Constitution* in the alleged failure by the respondents to implement the Advisory Opinion of the Supreme Court in accordance with the responsibility placed upon them by article 261(4). The due date as determined in the Advisory Opinion is August 27, 2015. Should the petitioner have waited until

> the violation occurred before approaching the court? The respondents think so.
>
> 68. I fully agree with the sentiments of the Bench in the CORD case. A party need not wait for a violation of a right or a contravention of the *Constitution* to occur before approaching the court for relief. It appears to me that the intent behind the use of the word "threatened" in both articles 22 and 258 was to preempt the violation of rights, or of the *Constitution*. If a clear threat to either is made out, it cannot be properly argued that the petitioner should have waited for the violation or contravention to occur, and then seek relief. It is therefore my finding, and I so hold, that this petition is not premature, and is properly before me.

59. In High Court Petition No 53 of 2017 *Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 others* [2018] eKLR, the Court had the following to say: -

> The word 'threatened', in my view, was included in article 22 of the *Constitution* to make it clear that an applicant may also approach a court to obtain an interdict to prevent a future violation of a right. Whether or not such an applicant will be successful depends on other considerations, but article 22 makes it clear that such an applicant will have standing to seek relief in such circumstances although no actual violation exists. In my view, the issue of threats to the violation of the fundamental rights and freedoms does not require a real and live case for the court to intervene. The irresistible conclusion is that the argument that this dispute is hypothetical fails.

60. The Court of Appeal has, as well, had a bite of the cherry. In Civil Application Nai 31 of 2016 *Alfred N Mutua* case (*supra*) the court dealt with the issue as to whether the intended arrest and prosecution of the Governor amounted to threat of the Governor's rights and fundamental freedoms. The High Court dismissed the Governor's interlocutory application to stay his arrest and prosecution. On appeal, the court stated as follows: -

> 35. In the instant case, the trial judge made a finding that there was no threat of violation of the applicant's fundamental rights and freedoms. We remind ourselves that the trial judge made this finding in an interlocutory application. In our view, whether there is a threatened violation is a matter of fact to be ascertained in a full hearing of the petition.

61. I am constrained to hold it here. As I have already said, an allegation of threat or violation of rights, fundamental freedoms or the *Constitution* is a matter of fact. As such, that factual allegation can only be dealt with by presentation of evidence either in an application properly presented to court or at the full hearing of the petition unless the petition cannot, for legally valid reasons, be sustained. In this matter the respondents are challenging the various parliamentary bills annexed in support of the petition. by way of preliminary objections, the respondents variously contend that the Bills do not amount to any evidence of threats to contravention of the *Constitution*.

62. Since the respondents are challenging the quality of the evidence in support of the petition, the manner in which they have done so is inappropriate. A preliminary objection is supposed to be limited to settled factual issues. In this matter, the respondents, hence, seem to have inappropriately raised the doctrine of ripeness. Such a discussion falls within the realm of a formal application or the main petition, but certainly not by way of a preliminary objection.

63. I will hence leave the consideration as to whether the petition is injusticiable on account of the doctrine of ripeness to be canvassed at the appropriate time, and, in the appropriate manner.

Whether the petition and the application seek an Advisory Opinion from the High Court:

64. From the court's finding on the preceding issue, and out of abundance of caution, I am of the very considered position that this issue may as well be dealt with alongside the first one.

Whether a certification should issue for empanelment of an expanded bench:

65. Applications for certification have a constitutional underpinning. the *Constitution* provides for certification in the superior courts under article 163(4)(b) and article 165(3) and (4).

66. Article 163(4)(b) provides as follows: -

163(4) Appeals shall lie from the Court of Appeal to the Supreme Court—

a. …………………

b. in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).

67. Article 165(3) and (4) states that: -

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(4) Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

(emphasis added)

68. The application under consideration relates to certification in the High Court; that is under article 165(3) and (4) of the *Constitution*.

69. The manner in which a single Judge of the High Court certifies that a matter raises a substantial question(s) of law so as to warrant the empanelment of an expanded bench has, on several instances, been dealt with by the superior courts.

70. The Supreme Court of Kenya in *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone* [2013] eKLR established the principles for certification under article 163(4)(b) of the *Constitution*. However, those principles were adopted, with modification, by the Court of Appeal in *Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others* [2017] eKLR when the Court of Appeal dealt with an appeal against a refusal by the High Court to certify a matter as raising substantial questions of law under article 165(4) of the *Constitution*.

71. The Supreme Court summed up the principles as follows: -

In summary, we would state the governing principles as follows:

i. for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;

iii. such question or questions of law must have arisen in the court or courts below, and must have been the subject of judicial determination;

iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of article 163 (4)(b) of the *Constitution*;

vi. the intending applicant has an obligation to identify and concisely set out the specific elements of "general public importance" which he or she attributes to the matter for which certification is sought;

vii. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.

72. As said, the Court of Appeal applied the above principles in *Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others* [2017] eKLR and expressed itself thus: -

42. In *Hermanus Phillipus Steyn v Giovanni Gnechi- Ruscone* [2013] eKLR the Supreme Court of Kenya pronounced governing principles for purposes of

certification under article 163(4)(b) some of which are relevant in the context of certification under article 165(4). Drawing therefrom, we adopt, with modification, the following principles:

i. For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;

ii. The applicant must show that there is a state of uncertainty in the law;

iii. The matter to be certified must fall within the terms of article 165(3)(b) or (d) of the *Constitution*;

vi. The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.

43. It is our judgment therefore, that whether a matter raises a substantial point of law for purposes of article 165(4) of the *Constitution* is a matter for determination on a case-by-case basis. The categories of factors that should be taken into account in arriving at that decision cannot be closed.

73. The High Court has as well severally dealt with the matter. In *Republic v Public Service Commission & Keriako Tobiko ex parte Nelson Havi* [2017] eKLR the court stated that: -

42. Whereas this court appreciates that the decision of an enlarged bench may well be of the same jurisprudential value in terms of precedent or stare decisis principles as a decision arrived at by a single High Court judge, the *Constitution* itself does recognise that in certain circumstances it may be prudent to have a matter which satisfies the constitutional criteria determined by a bench composed of numerically superior judges...

46. In the circumstances, I hereby certify that this matter raises a substantial question of law to warrant reference of the same to the Chief Justice as required under article 165(4) of the *Constitution*.

74. In *Philomena Mbete Mwilu v Director of Public Prosecution & 4 others* [2018] eKLR the High Court had the following to say: -

29. I fully agree with the above views on the jurisprudential value of decisions by a bench or a single judge of this court. Although the present petition can be heard by a single judge of this court and also being fully aware that a bench would sometimes require resources both personnel and financial as well as more time to resolve a petition than if it were heard by a single Judge, the present petition is the kind of petition that this court should exercise its discretion in favour of an expanded bench due to its public importance and significance in our constitutional democracy. The issues sought to be decided are not mere questions of law, they are substantial questions of law and their resolution will have a material bearing on the 1st respondent's decision to arrest and prosecute the petitioner and the independence of the judiciary.

75. Drawing from the foregoing, I will now apply the criterion laid by the Court of Appeal in *Okiya Omtatah Okoiti & another v Anne Waiguru* case (*supra*) in this case. Without much ado, all the principles laid down in the said decision fully apply, without any exception, in this matter. This matter is of immense public interest; the issues raised are not only weighty, but also complex and unsettled; further, the issues fall within the terms of article 165(3)(b) or (d) of the *Constitution* and the petitioners have crafted clear issues of law to be dealt with.

76. I am, hence, persuaded that this is a matter which raises substantial points of law for purposes of certification under article 165(4) of the *Constitution*.

The joinder applications:

77. I will, as well, leave all applications for joinder to be considered by the Multi-Judge bench.

Disposition:

78. Flowing from the above findings and conclusions, the disposition of the matters under consideration is as follows: -

a. The High Court is seized of the jurisdiction to deal with the petition dated September 16, 2020.

b. The preliminary objection dated September 29, 2020, the preliminary objection dated October 2, 2020 and the undated preliminary objection be and are hereby struck out with no order as to costs.

c. It is hereby certified that the petition dated September 16, 2020 raises substantial questions of law as to warrant an expanded bench of the High Court.

d. This matter is hereby referred to the honourable The Chief Justice of the Republic of Kenya to assign an uneven number of Judges, in terms of article 165(4) of the *Constitution*, to deal further.

e. The applications for joinder shall be dealt with by the expanded bench.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF NOVEMBER 2020

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Havi, Learned Counsel instructed by the firm of Messrs. Havi & C0mpany Advocates for the Petitioners.

Mr. Bitta, Learned Deputy Chief State Counsel instructed by the Hon. Attorney General for the 1st Respondent.

Mr. Kuiyoni, Learned Counsel for the 2nd Respondent.

Mr. Wambulwa, Learned Counsel for the 3rd Respondent.

Mr. Owiye, Learned Counsel for the 4th Respondent.

Dr. Khaminwa & Miss Valentine Khaminwa, Learned Counsels instructed by Messrs. Khaminwa & Khaminwa Advocates for the 1st & 2nd Intended Amici Curiae.

Miss. Nyuguto, Learned Counsel instructed by Messrs. Muthoni Nyuguto & Company Advocates for the 3rd Intended Amicus Curiae.

Dominic Waweru – Court Assistant